**Editor's note: 79 I.D. 457; Appealed -- aff'd, Civ. No. 76-155 (D. Nev. Nov. 4, 1977), aff'd, No. 78-1065 (9th Cir. July 10, 1980), 628 F.2d 1185, cert. denied, S. Ct. No. 80-1180 (March 23, 1981), 450 U.S. 997, 101 S.Ct. 1700**

UNITED STATES

v.

WILLIAM A. McCALL, SR.,

ESTATE OF OLAF HENRY NELSON, DECEASED

IBLA 71-228 Decided July 26, 1972

Appeal from decision of hearing examiner Graydon E. Holt declaring certain 10-acre subdivisions within several placer mining claims nonmineral in character as of July 23, 1955, and rejecting mineral patent application therefor, Nevada Contest 012928.

Affirmed in part; reversed in part.

Mineral Lands: Determination of character of -- Mining Claims: Common Varieties of Minerals: Generally -- Mining Claims: Patent

Where (1) an association placer mining claim embracing 80 acres was located for a common variety sand and gravel prior to July 23, 1955, (2) the sand and gravel was mined, removed and marketed at a profit from a portion of the claim before July 23, 1955, (3) a mineral patent has been

issued for some of the 10-acre subdivisions of the claim, and (4) the mineral material deposits on the unpatented portion of the claim are similar in nature to the mineral found on the patented portion of the claim, which deposits had been mined, removed and marketed at a profit prior to July 23, 1955, and thereafter, it is error to hold such unpatented 10-acre subdivisions within the claim to be nonmineral in character and to reject a mineral patent application therefor.

Mineral Lands: Determination of Character of -- Mining Claims: Common Varieties of Minerals: Generally -- Mining Claims: Patent

Where mineral material on some 10-acre subdivisions within an association placer mining claim embracing 80 acres is not of as high a quality as the mineral which was being mined, removed and marketed at a profit on July 23, 1955, from now patented portions of the claim, it is proper to hold that such unpatented 10-acre subdivisions within the claim are nonmineral in character and to reject a mineral patent application therefor.

Mineral Lands: Generally -- Mining Claims: Discovery: Generally

A single discovery of a valuable mineral deposit is sufficient to validate an association placer mining

> claim embracing 80 acres, and each 10-acre subdivision within the claim is properly determined to be mineral in character where the mineral material present is of a homogeneous nature throughout the entire 80 acre claim.

APPEARANCES: George W. Nilsson, Esq., Monta W. Shirley, Esq., of Counsel, for the Appellants. Otto Aho, Esq., Field Solicitor, U.S. Department of the Interior, for the United States.

OPINION BY MR. HENRIQUES

This is an appeal to the Secretary of the Interior from a decision of a hearing examiner dated February 19, 1971, holding that the land in certain 10-acre subdivisions is nonmineral in character, and rejecting mineral patent application Nevada 012928 for such lands.

Mineral patent application Nevada 012928, filed March 27, 1952, by William A. McCall, Sr., and Olaf Henry Nelson, included the Las Vegas Nos. 1 through 23, and 25 through 27 placer mining claims, situated in sections 15, 22, 27, 28 and 29, T. 20 S., R. 60 E., M.D.M., Clark County, Nevada. 1/ The land office

1/ The claims are adjacent to the boundaries of the city of Las Vegas, Nevada, and lie approximately 6 miles westerly from the Clark County Courthouse in the center of Las Vegas. The claims were located

manager issued a certificate October 8, 1954, naming all 26 claims. Patent 1211178 was issued thereafter on August 4, 1960, for 40 acres described as SW 1/4 NE 1/4 section 22, T. 20 S., R. 60 E., within Las Vegas No. 7 claim. 2/ Patent 27-65-0095 was issued September 25, 1964, for 190 acres described as SE 1/4 SE 1/4, S 1/2 NE 1/4 SE 1/4, NE 1/4 NE 1/4 SE 1/4 section 22 (within Las Vegas No. 1); SE 1/4 NE 1/4, E 1/2 NE 1/4 NE 1/4 section 22 (in Las Vegas No. 2), S 1/2 S 1/2 NW 1/4, NE 1/4 SE 1/4 NW 1/4 section 27 (in Las Vegas No. 18), and SE 1/4 NE 1/4 NW 1/4 section 27 (in Las Vegas No. 27), all in T. 20 S., R. 60 E.

A complaint issued October 1, 1964, by the acting manager, Nevada land office, Bureau of Land Management, alleged that the remaining 170 acres within the Las Vegas Nos. 1, 2, 7, 18 and 27 placer mining claims were nonmineral in character. 3/

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fn. 1 (Cont.)
by Vernon D. Bradley, John W. Bonner, N. C. Bradley and G. C. Bradley, on March 20, 1948. Each claim contained 80 acres, for a total of 2,080 acres in the 26 claims. The four locators conveyed the group of claims to Olaf H. Nelson, on June 1, 1948, and he, in turn, conveyed a one-half interest in the group to William A. McCall, Sr., on September 24, 1952.

2/ A patent, numbered 1211178, inadvertently was issued on August 4, 1960, for 400 acres, being all the land in the Las Vegas Nos. 1, 2, 7, 18 and 27 claims. This patent was canceled March 4, 1964, by the United States District Court for the District of Nevada, in Civil Case No. 471.

3/ Las Vegas No. 1: NW 1/4 NE 1/4 SE 1/4 section 22
Las Vegas No. 2: W 1/2 NE 1/4 NE 1/4 section 22
Las Vegas No. 7: NW 1/4 NE 1/4 section 22
Las Vegas No. 18: N 1/2 SW 1/4 NW 1/4, NW 1/4 SE 1/4 NW 1/4 section 27
Las Vegas No. 27: N 1/2 NE 1/4 NW 1/4, SW 1/4 NE 1/4 NW 1/4, NW 1/4 NW 1/4 section 27
All in T. 20 S., R. 60 E., M.D.M.

Following denial of the allegation, a hearing was held September 30, 1969, at Las Vegas. After hearing testimony and taking evidence, the hearing examiner held that the said land is nonmineral in character and rejected the mineral patent application therefor. This appeal followed.

The appellants make the following assertions:

1. The decision of the hearing examiner was in error because all of the land covered by each of the placer mining claims in question are mineral in character, mineral having been discovered and removed from each of the claims and from land adjacent thereto.

2. The decision of the hearing examiner was in error because it attempts to make laws, which is in violation of the Constitution which states the Congress shall make the laws, and denies the appellants due process of law.

3. The decision of the hearing examiner was in error because it was contrary to the evidence.

4. The decision of the hearing examiner requiring that there be a market for sand and gravel on certain fixed dates is unconstitutional, illegal, and void.

5. The decision of the hearing examiner was in error because the requirement of "Marketability at a Profit" supplements the "Prudent-man Rule" and therefore should have been published in the Federal Register, and also because it is vague and merely based on the opinion of the Department Solicitor.

Although mining claims on public land cannot be struck down arbitrarily, the Government has the power, so long as it holds legal

title to the land and after proper notice and upon adequate hearing, to determine whether the land is mineral in character and the claim valid, and if the land is found to be nonmineral in character or the claim invalid to declare it null and void. See Best et al. v. Humboldt Placer Mining Company, et al., 371 U.S. 334 (1963); Standard Oil of California et al. v. United States, 107 F.2d 402 (9th Cir. 1939), cert. denied, 309 U.S. 654 (1940).

Prior to consideration of the appellants' contentions of error, it is proper to note here that the Department has ample authority to refuse to issue a patent for mining claims and to order further proceedings at any time before patent issues to determine whether the requirements essential to establishing the validity of the mining claim have been met. United States v. H. B. Webb, 1 IBLA 67 (October 15, 1970); United States v. Eleanor A. Gray et al., A-28710 (Supp. II) (April 6, 1965); United States v. United States Borax Company, 58 I.D. 426 (1943).

A single discovery of mineral sufficient to authorize the location of a placer claim does not conclusively establish the mineral character of all the land included in the claim, and the question as to the character of the land is open for investigation and determination by the land department at any time until patent has issued. American Smelting and Refining Company, 39 L.D. 299 (1910).

To establish the mineral character of lands it must be shown that the known conditions are such as to engender the belief that the lands contain mineral of such quality and quantity as to render its extraction profitable and justify expenditure to that end; the mineral character may be established by inference without the exposure of the mineral deposit for which the land is supposed to be valuable. United States v. Henrietta Bunkowski and Andrew Julius Bunkowski, 5 IBLA 102, 79 I.D. (1972).

The evidentiary weight to be attached to the actual discovery or disclosure of placer mineral upon one portion of a 160-acre placer claim is dependent upon the character of the deposit and formation, the surrounding geologic conditions, and all the facts and circumstances of the particular case. Crystal Marble Quarries Company v. Dantice, et al., 41 L.D. 642 (1913).

Where the mineral character of some of the claimed land is contested although a discovery is recognized within the limits of the placer mining claim, the contestee must establish that each 10-acre tract within the entire claim is mineral in character. If the contestee fails to establish the mineral character of any 10-acre tract, that tract is properly excluded from the patent application. Id.; American Smelting and Refining Company, supra.

We turn now to appellants' first three contentions of error, which are intertwined and will be considered together. It is elementary that the terms "mineral" and "mineral in character" are not synonymous. "Mineral" is generally defined as an inorganic substance occurring in nature, though not necessarily of inorganic origin, which has (1) a definite chemical composition or, more commonly, a characteristic range of chemical composition, and (2) distinctive physical properties or molecular structure. A Dictionary of Mining and Mineral Related Terms, U.S. Bureau of Mines (1968).

> The mineral character of the land is established when it is shown to have upon or within it such a substance as --
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> (a) Is recognized as mineral, according to its chemical composition, by the standard authorities on the subject; or --
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> (b) Is classified as a mineral product in trade or commerce; or --
>
> (c) Such a substance (other than the mere surface which may be used for agricultural purposes) as possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts; --
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> And it is demonstrated that such substance exists therein or thereon in such quantities as render the land more valuable for the purpose of removing and marketing the substance than for any other purpose, and the removing and marketing of which will yield a profit; or, it is established that such substance exists in the lands in such quantities as would justify a prudent man in expending labor and capital in the effort to obtain it. Lindley on Mines, § 98. Cited with approbation in Layman et al. v. Ellis, 52 L.D. 714 (1929).

The mineral character of land may be established by inference without actual exposure of the mineral deposit for which the land is supposed to be valuable, but the inferred existence of a deposit of common variety sand and gravel at unknown depth beneath a dense caliche at the surface does not establish the mineral character of the land in the absence of evidence that extraction of the sand and gravel was economically feasible before July 23, 1955, thereby giving the land a practical value for mining purposes. Cf. State of California v. E. O. Rodeffer, 75 I.D. 176 (1968).

A discovery exists

> [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * * Castle v. Womble, 19 L.D. 455, 457 (1894); United States v. Coleman, 390 U.S. 599 (1968).

This test, the prudent man rule, has been refined to require a showing that the mineral in question can be extracted, removed, and presently marketed at a profit, the so-called marketability test. United States v. Coleman, supra. This present marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand. The marketability test

has been specifically held to be applicable in determining the validity of sand and gravel claims in the Las Vegas area. Palmer v. Dredge Corporation, 398 F.2d 791 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969); Foster v. Seaton, 271 F.2d 836 (D.C. Cir 1959); Osborne v. Hammit, Civil No. 414, D. Nev. (August 19, 1964).

A succinct discussion on marketability was given recently by the Court in Alfred N. Verrue v. United States, 457 F.2d 1202, 1203 (9th Cir. 1972):

> The criteria of marketability for sand and gravel claims was clearly announced in Foster v. Seaton, 106 U.S. App. D.C. 253, 271 F.2d 836, 838 (1959) wherein the court stated:
>
> > ". . . 'a mineral locator or applicant, to justify his possession, must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit'."
>
> The most recent and authoritative enunciation of this rule is found in United States v. Coleman, 390 U.S. 599, 88 S.Ct. 1327, 20 L.Ed.2d 170 (1968) and in Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971). In Barrows, the court analyzed the development of the marketability and prudent-man tests and determined at p. 82, in regard to the "prudent-man test", that:
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> > "Actual successful exploitation of a mining claim is not required to satisfy the 'prudent-man test'." [citing Coleman, supra]

and at p. 83, in regard to the "marketability test" that:

> "The 'marketability test' requires claimed materials to possess value as of the time of their discovery. Locations based on speculation that there may at some future date be a market for the discovered material cannot be sustained. What is required is that there be, at the time of discovery, a market for the discovered material that is sufficiently profitable to attract the efforts of a person of ordinary prudence." [emphasis in original]

A patent for a mining claim is an adjudication by the land department and a conveyance of title to the land which the patent describes and raises a presumption of right and regularity in all the proceedings antedating it. United States v. Beaman et al., 242 F. 876 (8th Cir. 1917). So the action taken by the land office to issue patents for some land in each of the five claims herein contested is prima facie evidence of a discovery under the mining laws and of the mineral character of the lands described in the patents.

The question before the hearing examiner was whether the specific nature of the sand and gravel material on each 10-acre subdivision named in the contest complaint was such as to engender a determination that the land was mineral in character within the comprehensive definition followed by the Department for the past century.

There is no controversy as to the general geology of the area surrounding the contested claims. They are in the valley fill, near Las Vegas, with a very slight slope generally toward the east. The mineral material present is limestone dolomite, eroded and washed down from the higher mountains to the west. This mineral material in easily recoverable form exists over many square miles of Las Vegas Valley. Evaporation of ground water has deposited the suspended calcium carbonate as a cementing agent, building a caliche-type conglomerate of varying thicknesses and hardnesses throughout the area. Action by sporadic run-off water has dissolved or weakened the cementation in and along some of the water courses, which together with wind action, has made small deposits of loose sand and gravel. There are numerous sand and gravel operators active in the Las Vegas area at this time, and there have been many for the past thirty years, with the operations being conducted on widely dispersed tracts, including the patented portions of the five claims involved in this proceeding.

What did the government present in support of its charge that the subject lands are nonmineral in character?

W. J. Egan, a mining engineer employed by the Bureau of Land Management, testified as an expert witness for the government. He made the following statements relative to each of the 10-acre subdivisions herein involved:

Q. What was your determination regarding the mineral character of the contested portion of the claims in question?

A. My determination was: that the land that each of these ten acre tracts was non mineral in character at that time. [sic]

Q. Please state, in detail, the basis of your determination?

A. I traversed each of those ten acre tracts by foot. I observed the condition of the ground relating to all the factors that go to determine the mineral character of a sand and gravel deposit. I made notes, observed the amount of material that was loose, or the amount of fines and low [sic] sand that was on the area. On the Las Vegas No. 1, this tract here, which would be described by legal subdivisions, as being in the northwest of the northeast of the south-east of section 22, range 6, township 20-south, range 60-east. The areas traversed by two small arroyos and, to the east, the sand and gravel had already been removed and there had been some pushing around of material on the extreme eastern edge.

Further to the west, the material is all covered with a small thickness of a small portion of surface gravel then a large portion of blow sand. Further to the west, you will get into outcroppings of hard caliche. On the Las Vegas No. 2, which would be described legally by the two ten acre tracts would be the north-west of the north-east of the north-east and south-west of the north-east of the north-east, section 22, township 20-south, range 60-east. There, again, you have a surface mantle of blow sand with small amounts of gravel. Then, as you proceed westward, the surface mantle tends to thin out and you have outcroppings of hard caliche and it is also evidenced in the arroyo that runs in the eastwest direction and it's probably about two feet deep. In the bottom of that arroyo is clear, visible, pronounced hard pan caliche. As you proceed westward, the same condition prevails in the Las Vegas No. 7, section 22, township 20-south, range 60-east and can be described legally as the ten acre tracts comprising the north half of the Las Vegas 7, or as the north-west quarter

of the north-east quarter forty acres. The surface mantle in this instance, in this portion of the area, is much thinner than it is further to the east. As you approach the western end of the claim, the caliche outcrops all over and there is little or no surface mantle in the area at all. On the las Vegas 27, as shown on the previous discussed exhibits and photographs, the entire area is almost exclusively devoid of any surface mantle and caliche is hard.

The same applies to the portion of Las Vegas 18, which is three ten acre tracts and can be described legally as the north-west of the north-west, and as the north-east of the south-west of the north-west and as the north-west of the south-east of the north-west, section 27, township 20-south, range 60-east. Based on the observations and conditions that prevail as to the condition of the type of ground and the difficulty that the bulldozer had in riping [sic] -- I might add that the bulldozer averaged somewhere around forty minutes to make each one of these passes. In some instances, he was as much as two hours. Of course, there were some minor ones that were less than that. I think the shortest one was fifteen minutes in which he was able to push up maybe twenty yards of material. In my opinion are [sic] the observations and the other conditions prevailing in that area, I made the determination that the land was non mineral in character as of that date and prior to that time, since there wasn't mineral in character [sic], it had to be non mineral and it was non mineral in character during the preceding years, also. The operations that were existing in the Las Vegas 18 had discontinued mining sometime in 1956 and they had made no attempt, at that time, to move elsewhere. There was markets [sic] in the area, but it is that this material could not compete at an economical rate with other producers.

Q. You stated that your last review or examination was September 29, 1969; is that correct?

A. Yes, sir.

Q. Was it your opinion, as of that date, that all the lands involved in this proceeding is non-mineral in character?

A. Yes.

(Transcript 34-37)

Exhibit 11, an aerial photograph taken October 4, 1964, depicts areas of operation within the Las Vegas Nos. 1, 2, 7, 18 and 27 claims. The extent of mining operations on these claims is clearly discernible. The picture shows indications of mining in the NW 1/4 NE 1/4 SE 1/4 section 22, within the Las Vegas No. 1, and in the W 1/2 NE 1/4 NE 1/4 section 22, within Las Vegas No. 2, as extensions of operations in the adjoining patented portions of these claims. Regardless of his ultimate conclusions, the testimony by Egan does not contradict the visual evidence on the photograph. Similarly, witnesses for McCall testified that sand and gravel was present on the surface of these three 10-acre subdivisions, albeit the loose surface material was slightly thinner than on the patented portions of the Las Vegas Nos. 1 and 2 claims. We are of the opinion, therefore, that the testimony and evidence support a determination that the unpatented 20 acres in the Las Vegas No. 2 claim are mineral in character, since the sand and gravel was mined from these three 10-acre tracts and they contained mineral material of the same nature as that found in the portions of the claims now patented.

The testimony of Egan indicates that the unpatented portions of Las Vegas Nos. 7, 18 and 27 claims are covered by a thin mantle of sand and gravel overlying a dense caliche. The aerial photograph does not show anything to the contrary. There is indication of scraping of loose surface materials in parts of Las Vegas No. 18, but no indication of any excavating in any of the unpatented portions of these three claims. The witnesses for McCall gave testimony that the buried material on the unpatented portions of these three claims was inferentially of the same character as the material under the patented portions of these claims and of other patented claims adjacent, but they admitted there was less exposed loose material on the surface of the unpatented portions. Egan conceded that in depth the deposits in the unpatented portions were probably similar to those in the patented lands but asserted that the unpatented tracts could not be mined and the extracted material processed economically in competition with other producers in the Las Vegas area as of 1955. The appellants did not offer any substantive rebuttal to this testimony. McCall testified as to past production from all five claims, with no definite figures for any one claim. He indicated that although his partner, O. H. Nelson, had been active as a contractor prior to his retirement in 1951, and had mined large quantities of sand and gravel from all his claims, he, McCall, had a policy not to attempt to operate a sand and gravel business but rather to license contractors or others to take material from the claims and pay him a royalty. He stated that he had charged a royalty of 5 cents a

yard prior to 1954, at which time he raised the rate to 10 cents. In 1966 he effected a further raise of 15 cents a yard.

The testimony indicates that prior to July 23, 1955, sand and gravel operations in Las Vegas Valley were largely limited to surface deposits because they were loose, most easily loaded and economical to mine. The caliche was not competitive in the market, even though it could be processed into the same kinds of material, due to the greater expenses entailed because of heavier equipment needed to rip the material or because of the need to drill and blast to break the rock. The excess costs for working the caliche were estimated to amount to 35 cents a yard.

We agree with the hearing examiner's conclusion that the unpatented portions of the Las Vegas Nos. 7, 18 and 27 claims are nonmineral in character because of the failure of the appellants to show that, at the time when the mineral material present on the subject lands was open to location under the mining laws, the mineral material could be mined, removed and marketed at a profit in the local market area. The mineral material on these 10-acre tracts was not of as high a quality as that which was being mined, removed and marketed at a profit from the now patented portions of these claims.

We turn now to the contentions of the appellants relating to marketability. In connection with discovery, satisfaction of the test of marketability as a proper complement to the prudent man rule is well established. United States v. Coleman, supra; United States v. Barrows et al., 404 F.2d 749 (9th Cir. 1968), cert. denied, 394 U.S. 974 (1969). Application of the marketability test to a determination of validity of sand and gravel claims in the Las Vegas area has been sustained repeatedly. Palmer v. Dredge Corporation, supra; Foster v. Seaton, supra; Osborne v. Hammit, supra. As has been shown above, for land to be determined to be mineral in character the rule has always included demonstration of removing and marketing at a profit. See Lindley on Mines, supra. We dismiss the contentions as being without merit.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the hearing examiner's decision is affirmed as to the contested lands within the Las Vegas Nos. 7, 18 and 27 placer mining claims, and is reversed as to NW 1/4 NE 1/4 SE 1/4 section 22 (within Las Vegas No. 1 claim) and to W 1/2 NE 1/4 NE 1/4 section 22 (within Las Vegas No. 2 claim), which are herein determined to be mineral in character and for which mineral patent may be issued in response

to application Nevada 012928. The case is remanded to the Bureau of Land Management for appropriate action consistent herewith.

Douglas E. Henriques
Member

We concur:

Newton Frishberg
Chairman

Edward W. Stuebing
Member